

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 182 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

ARJUNBHAI R GAMIT

Versus

STATE OF GUJARAT

Appearance:

MR UTPAL M PANCHAL for Appellant
Mr.Kamal Mehta, Addl.PUBLIC PROSECUTOR for Respondent

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 03/03/98

ORAL JUDGEMENT (Per Soni J.)

Appellant, orig. accused No.1 in Sessions Case No.150 of 1990, has filed this appeal against the judgment and order dated 6.3.91, whereby he is held guilty of offence punishable under sections 302 and 324

of I.P.C. and sec. 135 of the Bombay Police Act and is sentenced to undergo R.I. for life and a fine of Rs.200/-, in default R.I. for one month; R.I. for six months and fine of Rs.100/-, in default R.I. for 15 days' and R.I. for four months and a fine of Rs.100/-, in default R.I. for 15 days respectively.

Facts which led to the prosecution of the appellant ("accused" for short) are as under:-

Accused and other four accused, who are acquitted, are ordinary residents of village Karanjvel, Taluka Vyara of Surat District. Deceased Amritbhai, Islabhai Honiabhai P.W.3, Ranji VasANJI P.W.4, Govindbhai P.W.5, Dhirubhai Thakorebhai P.W. 6, Rameshbhai Dedabhai P.W 7 and other prosecution witnesses are also the ordinary residents of village Karanjvel. A month prior to 24.4.90, there was marriage of one Dinesh, son of Dhankabhai in Nisal falia. When the invitees were playing there, there was quarrel between the residents of the falia of the complainant and other persons of Patel falia, namely, Arjunbhai Ramabhai and others. There was scuffle between the two parties. Keeping this enmity in mind, the residents of Patel falia i.e. the accused side, had given threat to P.W. 5 to be killed. P.W.5 Govindbhai was afraid of the threat. He, therefore, had invited Amritbhai, P.W.3 and P.W.4 to stay at night at his house. P.W.3, P.W.4 and deceased Amritbhai had slept on the ota in the front of the house of P.W.5 in the night of 24.4.90. By about 11.30 night, P.W.3 wake up, as something strike on his left hand palm. He saw the accused no.1 in the light of the lamp of the house. The accused no.1 had an axe in his hand and he was inflicting blow on the complainant. A blow of axe was also given on the head of Amrit, who was sleeping besides him. P.W.3 complainant, therefore, awaken P.W.4, who had a torch with him and in the light of the torch, they identified all the five original accused. In the light, they saw that accused no.1 had an axe and others have given blows with fists. Complainant and P.W.4 awaken Govind, who was sleeping in his house and before Govind came to the site, assailants ran away. P.W.3 then went to the house of Dhirubhai and informed him of the incident. He was informed that Amritbhai is killed by accused and he was also injured by an axe. P.W.3 also informed P.W.6 Dhirubhai that accused no.1 was accompanied by other four original accused. He, therefore, took P.W.3, P.W.4 and P.W.5 to the house of Punaji, who was also told about the incident and the assailants. Punaji told his brother Ramesh, who had a bullet motor cycle, to take P.W.3 and P.W.5 to Vyara Police Station. They reached Vyara Police Station at about 1.00 A.M. of 25.4.90, where Police

Station Officer Hiraman issued a yadi to Medical Officer to treat P.W.3. Hiraman P.W.10 simultaneously informed P.S.I., who was at his home. P.S.I. then came and went to the hospital, where P.W.3 was being treated. He recorded his complaint and sent it to the Police Station to register the offence.

On the offence being registered, investigation was started and completed. Accused were chargesheeted in the court of J.M.F.C. Vyara, who, in his turn, committed the accused to the court of Sessions to stand their trial.

Learned Additional Sessions Judge framed charge, to which the accused pleaded not guilty. On completion of the trial, learned Judge recorded the conviction of the appellant and acquitted the other accused. Against that order of conviction, the present appeal is preferred.

Learned Advocate Mr.Panchal for the accused has challenged the conviction mainly on the ground that the prosecution has failed to establish the identity of the accused beyond reasonable doubt. Mr.Panchal contended that when the injured P.W.3 approached the Police Station at Vyara at about 1.00 A.M., he has not disclosed the names of the accused. Complainant P.W.3, an injured person, was given yadi by the Police to be treated at Referral Hospital, Vyara and there also, P.W.3 has not disclosed the names of the assailants. When P.S.I. Yasimkhan P.W.11 came to the hospital and recorded the complaint, the names are disclosed for the first time in the complaint. Mr.Panchal contended that P.W.3, when reached Police Station at Vyara, has not even disclosed other facts, except he being injured by axe by someone. Name of his assailant is also not disclosed. He has not disclosed before the Police that Amrit is killed and lying dead near the house of P.W.5 and said Amrit was assaulted by accused no.1 by an axe and he has seen accused no.1 with an axe in company of other four accused. Mr.Panchal contended that though the prosecution case is that immediately after the incident, names of the assailants are disclosed before Dhirubhai, Punaji and Rameshbhai, yet names were not disclosed before P.S.O. Hiraman P.W. 10. Mr.Panchal further contended that for non-examination of Punaji, an adverse inference must be drawn against the prosecution. Mr.Panchal, therefore, contended that these facts by themselves creates a doubt to the fact that any of the assailants was known to injured P.W.3, P.W.4 and P.W.5, who, in their turn, have disclosed their names to P.W.6 and 7. However, after the PSI approached them, the whole

case is concocted against the accused in view of the previous enmity because of quarrel, which took place a month before the incident. Mr.Panchal, therefore, contended that the learned Addl. Sessions Judge has erred in not giving benefit of doubt to the accused. Mr.Panchal has not raised any other contention.

Mr.Kamal Mehta,learned A.P.P., supports the judgment of the learned Additional Sessions Judge. Mr.Mehta contended that because of profused bleeding to P.W.3, P.W.10 has taken an instant humanitarian ground by sending the injured to the doctor for treatment. As the injured was immediately sent to the doctor, further enquiry into the cause of injury and recording of complaint have not taken place. Mr.Mehta further contended that simply because the names are not disclosed before P.S.O., that does not entitle the court to reject the evidence of eye witnesses and in particular of injured eye witness. Mr.Mehta further contended that the defence is not able to make out anything from the evidence of these eye witnesses P.W.3 and P.W.4 to reject or not to accept their evidence. Mr.Mehta, therefore, contended that the appeal may be dismissed.

The incident took place at about 11.30 P.M. of 23.4.90. After the incident took place, injured P.W.3 in company of P.W.6 and P.W.7 has gone to Vyara Police Station and the PSI Vyara sent P.W.3 to Referral Hospital, Vyara with a yadi Ex.15. In the course of treatment of P.W.3, PSO P.W.11 has reached the hospital by about 1.30 AM, where the complaint is recorded and the names of the accused are revealed. Said complaint is recorded at 3.00 AM, despite the fact that PSI has reached the hospital at about 1.30AM. Keeping in mind these facts, it will be relevant to read the evidence of P.W.3. P.W.3 has stated that he wake up instantly, as he was injured with axe on left hand wrist portion. He had a torch and he lighted the same. He saw in that light blood stained axe in the hand of accused. In the light of torch, he also saw accused nos.2, 3 and 4. They have cotton blanket and their hands were in the blanket. They had then gone away. He then shouted and P.W.5 and his wife, who were sleeping in the house, wake up. Deceased was injured on the neck. He was also injured on the belly. On their shout, the accused ran away. From this part of the evidence of P.W.3, P.W.3 wants to convey that on his being injured on the left hand wrist, he wake up and saw in the torch light the accused no.1 with blood stained axe and other four accused. Said accused ran away after they shouted and P.W.5 and his wife came out. Accused were covered by a cotton blanket and their hands were also covered under the blanket. After the accused

ran away, P.W.3 went to the house of P.W.6 and he was told that Amrit is killed and he was also injured on his hand. Then they went to the house of Punaji, brother of P.W.7. This P.W.3 in his cross-examination admitted that he has given names of assailants to P.W.6 and Punaji and then they had gone to Vyara Police Station. There also, they have given the names of the assailants. Thereafter, he was sent to hospital with yadi. He had talked in Vyara Police Station as to how Amrit died and who killed him. When he went to the hospital, it was all taken down in writing what he said. They might have reached at Vyara Police Station at about 12.00 mid-night. He has further stated in his cross-examination that he was not asked by the doctor as to who had assaulted him. He has further stated that when he saw the accused in the light of torch, they were at a distance of about 3 ft. away. He has denied the suggestion that the complaint and the names of the assailants are given after concoction. He has also denied that the assailants could not be identified, as they had gone at a sufficient long distance. From the evidence of P.W.3, it transpires that he disclosed the names of the assailants first to P.W.6, then to Punaji, then to P.W.10 and then in the complaint recorded by P.W.11. Though the names of the assailants were disclosed before P.W.10, P.W.10 has admitted that he has not taken down any complaint. He has immediately sent P.W.3 to the hospital, as he was bleeding. He has admitted in the cross-examination that for preparing yadi to the doctor, he has made some enquiries about the incident. In that interrogation, P.W.3 disclosed that he is injured on hand by axe. He had also told him that he is injured as assaulted by someone. He has further deposed in the cross-examination that he was not informed that a murder has taken place. Evidence of P.W.4 and P.W.5 is on the line of the evidence of P.W.3. Challenge to this evidence by Mr.Panchal is that the whole evidence is concocted. Witnesses have not seen the assailants. However, they are named because of previous enmity due to a quarrel, which took place a month before.

Fact remains that when P.W. 3 went to the Police Station, P.W.10 was present. He saw an injury on the left hand wrist of P.W.3 and the same was bleeding. As admitted in the cross-examination, he has stated that he did enquire about the incident and he was informed that he had an injury by an axe and the same is caused as someone has given the blow. He has admitted that this fact will constitute an offence under sec.324 of I.P.C. Despite this fact, he has not recorded the complaint; nor made an entry in the station diary. If P.W.3 would have disclosed these facts about the names of the assailants; about the death of Amritbhai caused by a blow given by

accused no.1 in company of other accused, we do not think that there was any reason for P.W.10 not to record the complaint, as stated by this witness before the court. P.W.10 is a responsible officer. He was a Police Station Officer at the relevant time. It is rather surprising that when P.W.3, P.W.6 and P.W.7 reached the Police Station, they have not informed the Police Station Officer that the murder has taken place and in the course of that incident, P.W.3 is injured. The fact which, therefore, emerges is that when P.W.3, P.W.6 and P.W.7 reached Vyara Police Station and met the Police Station Officer P.W.10, who issued a yadi on the medical Officer, they have not disclosed not only as to how the incident occurred, but have also not disclosed the name of the assailant of P.W.3, much less the fact of murder of Amrit and the names of his assailants.

Names of the assailants are first time coming on record in the complaint of P.W.3 recorded by P.W.11 in the Referral Hospital. That complaint is recorded at 3.00 A.M., practically after 1 1/2 hours. P.W.11 has not explained the delay. However, he states that immediately after the treatment of P.W.3 was over, he recorded the complaint.

According to P.W.3 in his substantive evidence before the court, he saw accused no.1 in the light of torch which he had at the relevant time. In his complaint at Ex.17, what he has stated is that he wake up because something strike on his left hand palm and when he saw in the light of the lamp of the house, accused had an axe in his hand. By the same, he was beating him and had given axe blow on the head of Amrit, who was sleeping besides him. He also saw Amrit bleeding profusely and was not able to speak. He, therefore, awaken P.W.4, who wake up and put on the torch which he had and saw accused no.1 in the company of other four accused and they being of their village, were identified. Accused No.1 had an axe. He assaulted with an axe. Others had given fist blows. He and P.W.4, therefore, went to awake Govind, who was sleeping in his house and on Govind coming out of the house, all the assailants have run away. In a complaint given to Police in the hospital by P.W.3, he has first seen the assailant accused no.1 in the light of the lamp of the house. Govind in his evidence has stated that at the time when P.W.3 and P.W.4 called him from his house, there was no lamp burning in his house. Question is: from where the light of lamp came and P.W.3 first saw the accused No.1 ? Then then come out with the case that they lighted torch and in the light of the torch, they saw the assailant at a distance of 3 to 3 1/2 ft. If P.W.3 and P.W.4 have seen the accused as stated by them, we fail to appreciate why the names of the

assailants, particularly of accused no.1, were not disclosed before P.W.10 and if the names were disclosed, why P.W.10 did not register the offence of injury on the left hand wrist by a weapon like axe under sec.324 of I.P.C. ? P.W.10 has admitted that neither he was informed about the murder having taken place at the time of incident; nor was he informed about the name of the assailant of P.W.3. For the first time, the names of the assailants are disclosed by 3.00 A.M. when a complaint is recorded by P.W.11. A suggestion is put to all the witnesses by the defence that because of previous enmity with these accused, they have framed this case against the accused as they were not knowing nor they have seen the assailants inflicting injury on the person of deceased and causing his death and also inflicting injury of axe on the hand of P.W.3.

Except the oral version of P.W. 3, P.W.4 and P.W.5, there is no independent corroborative evidence to substantiate their say. According to P.W.3, he had seen the accused with blood stained axe. However, said axe is alleged to have produced by the prosecution by orig. accused no.2 and that axe is not found even stained with blood. It is not relevant that the weapon is not found from the accused no.1. Accused no.1 was arrested between 16.45 hours and 18 hours of 24.4.90. He is found from his house. No incriminating substance is either found from his person or from his clothes. Thus, except the say of P.W.3 and P.W. 4, there is nothing on record to show that accused no.1 had inflicted injury on the person of the deceased, as a result of which he died. P.W.3 has not seen accused inflicting any blow on the deceased. It appears to be the inference as according to him he saw the accused with a blood stained axe and as he was injured. Even about his injury also, it is his inference that it is the accused who gave the blow and he is injured. He has not seen accused no.1 inflicting any blow either on the deceased or on himself. In the complaint, he states that he saw the accused in the light of the lamp of the house and then he refers to the light of the torch and then says the accused have run away after he saw them. If any person assaults someone at midnight in the dark and that person gets awakened, would the assailant stay there to allow the victims to see his face and identify him ? Our answer is in the negative. Our answer is in the negative because assailants, whoever they be, have taken necessary care to hide their identity. We say so because in the evidence it is there that accused were covered with cotton blanket. Thus, in our opinion, the evidence as to the identity of the accused by the prosecution witnesses is not established beyond reasonable doubt. From the circumstances, it

appears that accused are named only on the basis of inference and not on their actual identity. If they were seen by the witnesses, there was no reason for them not to disclose their names before PSO, where they went first to make complaint and then for medical treatment. However, P.W.3 was sent for medical treatment from that Police Station. There is no independent incriminating circumstance to support the identity of the accused or any other independent circumstance to link the accused with the incident of murder or of injury on P.W.3. It appears that on this premises, the learned Judge has given benefit of doubt to accused nos.2 to 5. In our opinion, the case of this appellant also would fall within the brackets of those accused. The appellant is, therefore, entitled to benefit of doubt.

In the result, the appeal is allowed. The judgment and order of conviction is quashed and sentence is set aside. Appellant be set at liberty forthwith, if not required in any other case. Fine, if paid, be refunded.
